United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

77-7154

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NORMAN J. BERNSTEIN, HUSBAND
Plaintiff-Appellant

v.

STATE OF FLORIDA, RAYMOND E. RHODES, CLERK AND INDIVIDUALLY, ALBAN E. BROOKE, DONALD S. REISMAN, MARGUERITE H. BERNSTEIN, WIFE,
Defendants-Appellees

ELDAD W. BROPHY, HUSBAND
Plaintiff-Appellant

v.

THE STATE OF NEW HAMPSHIRE, GRAPER AND SWANSON, PROFESSIONAL ASSOCIATION and as Individuals, and ANN BROPHY, WIFE,
Defendants-Appellees

Docket No. 77-7085

Docket No. 77-7154

BRIEF FOR PLAINTIFF-APPELLANT

APPENDIX

NORMAN J. BERNSTEIN
Attorney
Thompsonburg
Londonderry, Vermont 05148

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RESUME

This action was brought by Plaintiff-Appellant alleging the following actionable wrongs and unconstitutional acts, or laws:

1. The divorce proceedings in Florida involving Plaintiff-Appellant violated his constitutional rights of the free exercise of his religion and abridged his privileges and immunities as a citizen of the United States and deprived him of life, liberty and property without due process and denied him equal protection of the law. Thus, the Florida divorce laws are unconstitutional.

2. Plaintiff-Appellant was denied his civil rights by the State of Florida and certain other defendants.

The complaint is against five defendants and one defendant is sued

in two capacities.

The complaint contains five (5) counts and some forty-two (42) paragraphs.

The case involves fundamental and far reaching issues vital to the well being of the Nation. In 1975 there were over one million divorces granted involving two to five million people including the children of said marriages. Most of these divorces are of the "no fault" type. To continue to permit this travesty could literally result in the Death of Our Nation.

Point I

'FREE EXERCISE' RIGHTS OF A BORN AGAIN CHRISTIAN. In its Memorandum and Order of February 1, 1977 dismissing the action on motion, the Court recognized appellant to be a "Reborn Christian".

President Jimmy Carter is a Reborn Christian. Reuben Askew, Governor of Florida is a Reborn Christian.

There are millions of Reborn Christians in the United States which holds itself out to be a Nation "under God" whose principles are founded on the Holy Bible, both Old and New Testaments, and the Judeo-Christian Ethic.

The President of the United States and Judges are sworn into office by placing their hands on the Holy Bible.

The Holy Bible speaks of being born again through the very words of Jesus Christ in the Gospel of St. John in the 3rd Chapter (see verses 1 through 8). St. Peter also refers to being born again in his First Epistle, Chapter 1, Verse 23.

In St. Paul's second letter to the Corinthians at Verse 17 he says:

> Therefore if any man be in Christ, he is a new creature; old things are passed away; behold, all things are become new

On November 9, 1975, Appellant accepted Christ and thus became a new creature governed by the Holy Bible or Word of God.

The Holy Bible speaks through Jesus in the Tenth Chapter of the Gospel according to St. Mark. He unequivocally states that divorce is not in God's Plan. He cautions against man's putting asunder what God hath joined.

Appellant, in November 1975, moved the Florida Court to grant spiritual counselling to the parties of an 18 year marriage. The motion was ignored and in December, 1975, a divorce decree was granted to a non-appearing and distraught husband - the appellant herein.

As stated by Rev. Milton T. Wells, President of the Eastern Bible Institute (now Northeast Bible College, Assemblies of God) in a book entitled "Does Divorce Dissolve Marriage" (1957) Christ "does <u>not</u> make any allowance for any document which will <u>dissolve</u> a marriage for any cause."

The laws and acts of the State of Florida through its courts and their administrators and the attorneys involved deprived the appellant of his constitutional rights of the free exercise of his religion, abridged his privileges and immunities as a citizen of the United States and State of Vermont and in essence deprived him of his life, liberty and property without due process and denied him equal protection of the law.

He should be allowed to prove this in a full trial based on the issues in the complaint and not on a summary judgment!

In support of the foregoing, Appellant in his argument on the Motion to Dismiss Hearing of 1/21/77 in the District Court cited or discussed:

a. Volume 1, Page 1 of the Vermont State Statutes (1 V.S.A.1) wherein it is noted that at the first session of the Vermont General Assembly held March 12, 1778 there is stated to have been passed laws

> "as they stand in the Connecticut Law Book and in defect of that, the plain word of God ascertained in the Scriptures, to be the Law of the Land until the Legislature should have time to digest and enact a code adapted to the condition of the country."

b. Vermont Constitution - Chapter I Article 3rd

> "...all men have a natural and unalienable right to worship Almighty God, according to the dictates of their own consciences, as in their opinion shall be regulated by the Word of God ... nor can any man be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments, or peculiar mode of religious worship...
>
> Nevertheless, every sect or denomination ought to observe the Sabbath or Lord's Day, and keep up some sort of religious worship..."

c. 14 Am Jur Pl and Pr Forms (Rev.) p6

> "At common law, husband and wife become one person as a result of their marriage to each other, that person legally being the husband.
>
> However, the separate existence of the wife has long been recognized in equity, with respect to her separate (equitable) estate ...This does not mean, however, that complete severance of this legal unity of husband and wife has been accomplished. The family relation is not affected except as it pertains to property.

d. 16 Am Jur 2d 646 FF

> It is now settled, however, that the states are precluded from abridging religious liberties by the due process clause of the Fourteenth Amendment ... Footnote 12 ... However, as distinguished from the religions of Confucius Gautama, Mohammed, or even Abram, it has been said that by reason of number

influence and station of its devotees within our territorial boundaries, the religion of Christ is the prevaling religion of this country. State v. Mockus, 120 Me 84, 113 A39, 14 ALR 871... The crowning glory of American Freedom is absolute religious liberty; every american has the unquestioned and untrammeled right to worship God according to the dictates of his own conscience, without let or hindrance from any person or any source. Cline v. State, 9 Okla. Crim. 40, 130 Pg 10.

e. 16 Am Jur 2d 649 FF
Footnote 16

"The purpose of the 'free exercise' clause of the First Amendment, which withdraws from legislative power, State and Federal, the exertion of any restraint on the free exercise of religion is to secure religious liberty in the individual by prohibiting any invasions thereto by civic authority; hence it is necessary in a free exercise case for one to show the coercive effect of a legislative enactment as it operates against him in the practice of his religion. School Dist. of Abington Twp v. Schempp, 374 US 203, 10 L.Ed.844, 833 S.Ct. 1560... pg. 51...

Touching religion there is a doubtful zone which legislation should be most reluctant to enter. The founders of the nation recognized it when they placed the Great Guaranty of Religious Liberty in the constitution of a free people, and it is for every court to see that liberty is not encroached upon or that freedom gnawed and impaired by any experimental legislation, however well meant. So, when legislation does enter the uncertain domain, the fact that it is there must bring it to condemnation. In accordance with the dictate of the Constitution itself, the doubt will be resolved in favor of religious liberty ...

The Constitutional prohibition of abridgement of religious freedoms as well as its provision respecting an establishment of religion are to be broadly interpreted.

f. U.S. Currency has motto - In God We Trust
The Holy Bible is used for U.S. swearing in service of President, Judges, etc.

g. Scripture (King James version) on marriage, divorce, etc.

(as submitted in Plaintiff's Memorandum of 1/24/77).

1. Genesis 2:24

Therefore shall a man leave his father and his mother, and shall cleave unto his wife: and they shall be one flesh.

2. Malachi 2:14-16

Yet ye say, Wherefore? Because the Lord hath been witness between thee and the wife of thy youth, against whom thou hast dealt treacherously: yet is she thy companion, and the wife of thy covenant.

And did not he make one? Yet had he the residue of the spirit. And wherefore one? That he might seek a godly seed. Therefore take heed to your spirit, and let none deal treacherously against the wife of his youth.

For the Lord, the God of Israel, saith that he hateth putting away: for one covereth violence with his garment, saith the Lord of hosts: therefore take heed to your spirit, that ye deal not treacherously.

3. Matthew 5:31,32

It hath been said, Whosoever shall put away his wife, let him give her a writing of divorcement:

But I say unto you, That whosoever shall put away his wife, saving for the cause of fornication, causeth her to commit adultery: and whosoever shall marry her that is divorced committeth adultery.

4. Matthew 19:3-9

The Pharisees also came unto him, tempting him, and saying unto him, Is it lawful for a man to put away his wife for every cause?

And he answered and said unto them, Have ye not read, that he which made them at the beginning made them male and female,

And said, For this cause shall a man leave father and mother, and shall cleave to his wife: and they twain shall be one flesh?

Wherefore they are no more twain, but one flesh. What therefore God hath joined together, let not man put asunder.

They say unto him, Why did Moses then command to give a writing of divorcement, and to put her away?

He saith unto them, Moses because of the hardness of your hearts suffered you to put away your wives: but from the beginning it was not so.

And I say unto you, Whosoever shall put away his wife, except it be for fornication, and shall marry another, committeth adultery: and whoso marrieth her which is put away doth commit adultery.

5. Mark 10:1-12

And he arose from thence, and cometh into the coasts of Judaea by the farther side of Jordan: and the people resort unto him again; and, as he was wont, he taught them again.

And the Pharisees came to him, and asked him, Is it lawful for a man to put away his wife? tempting him.

And he answered and said unto them, What did Moses command you?

And they said, Moses suffered to write a bill of divorcement, and to put her away.

And Jesus answered and said unto them, For the hardness of your heart he wrote you this precept.

But from the beginning of the creation God made them male and female.

For this cause shall a man leave his father and mother, and cleave to his wife;

And they twain shall be one flesh: so then they are no more twain, but one flesh.

What therefore God hath joined together, let not man put asunder.

And in the house his disciples asked him again of the same matter.

And he saith unto them, Whosoever shall put away his wife, and marry another, committeth adultery against her.

And if a woman shall put away her husband, and be married to another, she committeth adultery.

6. Colossians 3:18,19

Wives, submit yourselves unto your own husbands, as it is fit in the Lord.

Husbands, love your wives, and be not bitter against them.

7. Ephesians 5:22-33

Wives, submit yourselves unto your own husbands, as unto the Lord.

For the husband is the head of the wife, even as Christ is the head of the church: and he is the saviour of the body.

Therefore as the church is subject unto Christ, so let the wives be to their own husbands in every thing.

Husbands, love your wives, even as Christ also loved the church, and gave himself for it;

That he might sanctify and cleanse it with the washing of water by the word,

That he might present it to himself a glorious church, not having spot, or wrinkle, or any such thing; but that it should be holy and without blemish.

So ought men to love their wives as their own bodies. He that loveth his wife loveth himself.

For no man ever yet hated his own flesh; but nourisheth and cherisheth it, even as the Lord the church:

For we are members of his body, of his flesh, and of his bones.

For this cause shall a man leave his father and mother, and shall be joined unto his wife, and they two shall be one flesh.

This is a great mystery: but I speak concerning Christ and the church.

Nevertheless let every one of you in particular so love his wife even as himself; and the wife see that she reverence her husband.

8. First Peter 3:1-7

> Likewise, ye wives, be in subjection to your own husbands; that, if any obey not the word, they also may without the word be won by the conversation of the wives;
>
> While they behold your chaste conversation coupled with fear.
>
> Whose adorning let it not be that outward adorning of plaiting the hair, and of wearing of gold, or of putting on of apparel;
>
> But let it be the hidden man of the heart, in that which is not corruptible, even the ornament of a meek and quiet spirit, which is in the sight of God of great price.
>
> For after this manner in the old time the holy women also, who trusted in God, adorned themselves, being in subjection unto their own husbands:
>
> Even as Sara obeyed Abraham, calling him lord: whose daughters ye are, as long as ye do well, and are not afraid with any amazement.
>
> Likewise, ye husbands, dwell with them according to knowledge, giving honour unto the wife, as unto the weaker vessel, and as being heirs together of the grace of life; that your prayers be not hindered.

h. A book by Rev. Bob Mumford entitled "Living Happily Ever After" (Fleming H. Revell Co., 1973) where he states that it is obvious and evident to him that there is a satanic attack on marriage in our country.

In connection with this reference,the appellant cited from the Bible the admonition of St. Peter in his First Epistle General, Chapter 5, Verse 8:

> Be sober, be vigilant; because your adversary the devil, as a roaring lion, walketh about seeing whom he may devour.

i. The President's sister, a nationally recognized born again evangelist defined a born again experience on January 21, 1977 on the

PTL T.V. Program on Station WMTW in these terms:

> "To come into an awareness of Jesus Christ...
> to find life where death, hope where depression...
> knowledge of joy in the face of trials..."

To permit a "quickie" divorce decree to stand in the face of the travesty perpetrated by the courts, its agents, attorneys, etc. of the State of Florida against Norman J. Bernstein, a Reborn Christian who was married to Marguerite Bernstein for 18 years and who was a resident of Vermont for 6 years at the time of the decree and who desparately sought religious counselling constitutes a flagrant violation of his constitutional right against abridgement of his religious freedom.

Point II

DUE PROCESS -- the laws of Florida and the acts or omissions of the governmental officials of Florida including the Governor, Attorney General, Clerk of the Court and the attorneys denied appellant his constitutional rights, privileges and immunities as a citizen of the United States of due process, and equal protection.

Appellant's lengthy and extensive complaint, prepared by himself as his own counsel, after serving in a clergy position in Florida, alleges the following:

1. The state lines and diverse state divorce laws are outdated and unconstitutional and encourage parties to move interstate and obtain divorces.

2. The judicial system of Florida is not appropriate to handle family problems involving marriage, divorce, etc.

3. The judicial system as it operated against Appellant was prejudicial, vague, indefinite, etc.

4. That the acts of the governmental officials, judges, clerks and attorneys in this case deprived him of his constitutional rights of due process etc.

The Memorandum and Order of the District Court of February 1, 1977 is in error in that

1. It is clear what appellant's claim of unconstitutionality is.

2. It is clear by the disintegration of the american family caused by "no fault" divorce laws that exparte Young 209 U.S. 123, a 1908 case should be reinterpreted in 1977 as suggested by Justice Douglas in his dissent in Edelman v. Jordan, 415 U.S. 651, a 1974 case!

Appellant has suffered actual damages in addition to the misery of his broken marital ties!

3. Injunctive relief should be given as the Governor and Attorney General are noted in Count 1, paragraph 20 and their omission as parties defendant is only a technicality.

4. The acts of defendant Rhodes were so abusive and extra-judicial so as to make them actionable. They do not compare with the facts in the 3 cases cited by the District Court.

5. The acts of the two attorney defendants flagrantly reveal the deprivation of his constitutional rights.

In Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, it clearly states that suits against State and County officials to enjoin them from invading constitutional rights are not forbidden by the 11th Amendment.

Point III

CIVIL RIGHTS. In paragraph 1 of the Complaint, appellant alleges his civil rights have been violated. While not specifically referred to,

appellant has made a good and sufficient case for deprivation of rights under Section 1983 of Title 42, United States Code and civil conspiracy under 42 U.S.C. section 1985. Under the Federal Rules of Civic Procedure, a complaint need only give the defendant fair notice of the claim and grounds upon which it rests. Conley v. Gibson, 355 U.S. 41, 48, 78 S.Ct. 99, 2L.Ed. 80 (1957). Rather, the court is under a duty to examine the complaint to determine if there are grounds---------- or any possible theory. Word v. McIlroy, 296 F.2d 12, 14 (9th Cir. 1961).

The purpose of these sections were to afford federal rights in federal courts because by reason of prejudice, passion, neglect or intolerance or otherwise, state laws might not be enforced and claims of citizens to enjoyment of rights, privileges and immunities guaranteed by Fourteenth Amendment might be denied. Dist. of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602 (1973).

The District erred in overlooking appellant's complaint on violation of his civil rights!

Point IV

Federal Rule of Civil Procedure 4(e) concerning service of process and 28 U.S.C. 1391(b) concerning venue are unconstitutional with respect to divorce cases in that they violate appellant's right to due process of law as guaranteed by the Fourteenth Amendment.

Prior to their divorce in Florida in 1975, Appellant and his wife had been residents of the State of Vermont. Appellant tried to stay the divorce proceedings pending counselling to save the marriage, but his attempts were frustrated. Appellant was forced to return to his home in Vermont, but retained an attorney in Florida to prosecute his appeal of the decree. This appeal was dismissed for failure to prosecute.

Appellant lives some fifteen hundred miles from the State of Florida. His financial resources are such that he cannot afford to go to Florida himself to prosecute this action. The cost of legal services is soaring to the point where very few citizens can actually afford the services of an attorney without going into severe financial debt. Yet the Federal Rules of Civil Procedure and 28 U.S.C. 1391(b) would require Appellant to bring this action in Florida. The rules have failed to recognize the very nature of the marriage relationship which distinguishes it from other "civil actions".

The U.S. Supreme Court has characterized marriage as "one of the 'basic civil rights of man' fundamental to our very existence and survival". Loving v. Virginia, 388 U.S. 1 (1967) citing Skinner v. State of Oklahoma, 316 U.S. 535 (1942). The nature of the marital relationship to society was expressed in Maynard v. Hill, 125 U.S. 190 (1888). The court in Maynard described marriage as one of the most important relations in life and "as having more to do with the morals and civilization of a people than any other institution." The Court went further saying, "It is an institution, the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." Maynard v. Hill, 125 U.S. 190, 211 (1888).

Despite the tremondous importance of the marital relationship to our society, state legislatures have made it increasingly easier for this relationship to be dissolved. State court jurisdiction is founded on the basis of domicile. All one spouse has to do is move from the state of the marital home and seek divorce in another state. This decree of divorce must be recognized throughout the nation by the full faith and

credit clause, Article IV Section 1 of the Constitution, if the requisite domicile is present. Williams v. North Carolina, 317 U.S. 287 (1942), even if the defendant is not present at the hearing.

The effect of these laws is to encourage persons who are having marital difficulties to cross state lines in order to find the easiest way to dissolve the marriage. The action is then brought in a jurisdiction foreign to the defendant and the burden and expense of defending the action away from home is placed on the defendant. This effect is exactly the opposite of that intended by Congress in 28 U.S.C. 1391(b) and the Supreme Court in molding the boundaries of venue and jurisdiction.

The general purpose of the venue laws is to save the defendant from the hardships and inconvenience of litigating far from their residences. Neirbo v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939). The effect of upholding the Florida venue and jurisdiction requirement is to force the defendant to travel far from his home to defend the action and suffer all the accompanying inconveniences and hardships. If the defendant wants to challenge a decree entered ex-parte, again the only choice is to bring suit in a foreign jurisdiction or let the decree go unchallenged.

The effects of the decision of the U.S. District Court for the District of Vermont is to deny the appellant a forum in which he can vindicate his constitutionally guaranteed rights. The court may take judicial notice of the cost of litigation these days. In order to adequately defend a lawsuit, thousands of dollars are often spent. This figure is increased proportionately where the defendant is forced to defend a divorce action in another state. He loses time from work, incurs transportation and lodging costs in addition to the cost of legal services.

In Boddie v. Connecticut, 401 U.S. 392 (1971) the U.S. Supreme Court struck down a Connecticut statute which required certain fees to be paid prior to the commencement of litigation to obtain a divorce. The court held that a state may not deny, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages.

As to the appellants in Boddie, appellant here is denied his only avenue to the judicial system because of the economic barriers involved in getting into the Federal Court system. The court in Boddie expressed the importance of providing access to the court system in saying, "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of a state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interferred with an individual's exercise of these rights.

No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." Boddie v. Connecticut, Id. at 379.

If Appellant here is denied access to the federal court in Vermont, he is virtually denied access to any court, and thus is denied an opportunity to defend those rights which our founding fathers deemed so important in a free democratic society.

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MEMORANDUM AND ORDER

The complaint in this action is similarly stated to that in Bernstein v. State of Florida, Civil Action No. 76-212. It is drafted by the same hand in behalf of Eldad Brophy, "a resident pro tem of the State of Vermont" - who is a "Born Again Christian," allegedly victimized by the divorce laws of the State of New Hampshire. He seeks to have a divorce granted in New Hampshire declared null and void and asks for monetary damages and injunctive relief. All defendants have moved to dismiss the action on grounds similar to those advanced in Bernstein v. Florida.

For the reasons stated in the court's memorandum in Bernstein v. Florida, the motions of the defendants are granted. The motions of the defendants State of New mpshire and Graper & Swanson for attorneys' fees are denied ~~now~~ for the reason that the court specifically indicated to the defendants that they were not required to argue the motions orally and the court would consider their respective motions on the written briefs. The Clerk will enter an order dismissing the action. It is SO ORDERED.

Dated at Rutland, in the District of Vermont, this 1st day of February, 1977.

James S. Holden

James S. Holden
Chief Judge